

FILED  
COURT OF APPEALS  
DIVISION II

2017 FEB 22 AM 11:03

Case No. 48935-0-II STATE OF WASHINGTON

BY 

DEPUTY

---

**IN THE COURT OF APPEALS, DIVISION TWO OF THE STATE  
OF WASHINGTON**

---

STATE OF WASHINGTON  
Plaintiff/Respondent,

vs.

DALE SMITH,  
Defendant/Appellant.

---

Appeal from the Superior Court of Mason County

Superior Court Case No. 16-1-00005-21

---

**APPELLANT'S REPLY BRIEF**

---

Eugene C. Austin  
Attorney for the Appellant  
WSBA #31129  
PO Box 1753  
Belfair, WA 98528  
(360) 551-0782

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
Table of Cases.....	ii
Table of Statutes .....	iii
Table of Other Authorities.....	iii
Table of Rules.....	iii
ARGUMENTS.....	1
I.    RCW 70.96A.120 applies to the involuntary commitment of Mr. Smith by law enforcement and required that Mr. Smith incapacitated or gravely disabled by alcohol in addition to making suicidal statements.....	1
II.   When reviewed in the light most favorable to the State, the State's evidence demonstrates that Mr. Smith could not form the necessary intent and that the State failed to meet its burden as to the element of intent .....	3
III.  Jury instructions are not proper simply because they are standard WPIC instructions .....	10
IV   The doctrine of invited error does not apply in this case as the State claims .....	11
V.   A failure to object to instructions that relieve the State of its burden to prove every element beyond a reasonable doubt does not waive the right to raise the issue on appeal because it is an error of constitutional magnitude and prejudice is presumed .....	12
VI.  The "to convict" instruction did not contain all the necessay elements of the crime because it did not contain the elements of assault and a definition that is not subject to proof beyond a reasonable doubt is insufficient to correct this error. The State bears the burden of proving everly element beyond a reasonable doubt including the elements of assault.....	13
VII. The failure of defense counsel to present evidense on involuntary intoxication or raise the issue of the involuntray commitment constituted Ineffective counsel because there is no legitimate stratigy to justify the failure..	22
CONCLUSION.....	25

# TABLE OF AUTHORITIES

## Table of Cases

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	14
<i>State v. Allen</i> , 67 Wn.App. 824, 840 P.2d 905 (Div. 3 1992).....	14
<i>State v. Alvarez-Abrego</i> , 154 Wn.App. 351, 225 P.3d 396 (Div. 2 2010) .....	16
<i>State v. Atkins</i> , 156 Wn.App. 799, 236 P.3d 897 (Div. 1 2010).....	14
<i>State v. Aumick</i> , 73 Wn.App. 379, 869 P.2d 421 (Div. 3 1994).....	14, 19
<i>State v. Bennett</i> , 161 Wash.2d 303, 165 P.3d 1241 (2007) .....	14, 20
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002) .....	12, 13, 14, 17, 21
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.2d 396 (1995) ...	11, 13, 14, 18, 20, 22
<i>State v. Clausing</i> , 147 Wn.2d 620, 56 P.3d 550 (2002).....	14, 16
<i>State v. Emmanuel</i> , 42 Wn.2d 799, 259 P.2d 845 (1953).....	17, 20
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	12
<i>State v. Goble</i> , 131 Wn.App. 194, 126 P.3d 821 (Div. 2 2005).....	12, 14, 22
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985) .....	14, 16
<i>State v. Hayward</i> , 152 Wn.App. 632, 217 P.3d 354 (Div. 2 2009).....	14, 22
<i>State v. Hupe</i> , 50 Wn.App. 277, 282, 748 P.2d 263 (Div. 1 1988).....	19
<i>State v. Lynch</i> , 178 Wn.2d 487, 309 P.3d 482 (2013) .....	16
<i>State v. Mannering</i> , 150 Wn.2d 277, 75 P.3d 961 (2003) .....	24
<i>State v. McDaniel</i> , 155 Wn.App. 829, 230 P.3d 245 (Div. 2 2010).....	16
<i>State v. McFarland</i> , 899 P.2d 1251, 127 Wn.2d 322 (Wash. 1995) .....	24
<i>State v. Nichols</i> , 162 P.3d 1122, 161 Wn.2d 1 (Wash. 2007).....	25
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	12, 15, 16
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	14, 20
<i>State v. Pope</i> , 100 Wn.App. 624, 999 P.2d 51 (Div. 2 2000).....	13, 16, 17, 18, 21
<i>State v. Rice</i> , 102 Wn.2d 120, 683 P.2d 199 (1984) .....	16
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	4
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	14, 17, 18, 20
<i>State v. Stein</i> , 144 Wn.2d 236, 241, 27 P.3d 184 (2001) .....	14
<i>State v. Stephens</i> , 93 Wash.2d 186, 607 P.2d 304 (1980) .....	16, 20, 21
<i>State v. Strong</i> , 272 P.3d 281, 167 Wn.App. 206 (Wash.App. Div. 3 2012) .....	14, 20

1	<i>State v. Theroff</i> , 25 Wash.App. 590, 608 P.2d 1254, aff'd, 95 Wash.2d 385, 622 P.2d 1240 (1980) .....	4
2	<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) .....	11

3

### *Table of Statutes*

4

5	RCW 70.96A.020(11).....	6, 7
5	RCW 70.96A.020(13).....	6
6	RCW 70.96A.120(2).....	1, 2, 5, 6, 7, 9, 10, 23, 25
6	U.S. Const. amend. IV. ....	4

7

### *Table of Other Authorities*

8

9	Brief of Respondent .....	passim
10	Jury Instruction No. 1 .....	23
10	Jury Instruction No. 10 .....	23
11	Jury Instruction No. 3 .....	22, 23, 24
11	Jury Instruction No. 5 .....	21, 22, 23, 25
12	Jury Instruction No. 6 .....	12, 13, 20, 24
12	Record .....	passim
13	Verbatim Report of Proceedings.....	passim

13

### *Table of Rules*

14

15	RAP 2.5(a) .....	15
----	------------------	----

16

17

18

19

20

21

22

23

24

1 ARGUMENTS

2 I. *RCW 70.96A.120 applies to the involuntary commitment of*  
3 *Mr. Smith by law enforcement and required that Mr. Smith*  
4 *incapacitated or gravely disabled by alcohol in addition to*  
5 *making suicidal statements*

6 The State asserts that it proved Mr. Smith acted with the necessary  
7 intent. Brief of Respondent, at 10. The State does not actually explain this,  
8 but instead acknowledges that involuntary intoxication as an issue is  
9 appropriate. *Id.* The State then asserts "that both Deputy Schlecht and  
10 Deputy Andersen clearly stated that Smith was being involuntarily  
11 committed under the act due to his suicidal statements." *Id.*, at 11.  
12 However, this is a mischaracterisation of the testimony, as "suicidal  
13 statements" is only one of the reasons mentioned by the officers. See, VRP  
14 at 57, 58, 67, 68, 74, 76.

15 The State argues that

16 Smith could not have been committed under the involuntary  
17 treatment act, RCW 70.96A.120(2), for his intoxication level  
18 because that provision in the act requires the individual to be in a  
19 public place, which Smith was not.

20 Brief of Respondent, at 11. The State then quotes a section of the  
21 Involuntary Treatment Act (Act)<sup>1</sup> that states:

22 *... a person who appears to be incapacitated or gravely disabled*  
23 *by alcohol or other drugs and who is in a public place or who has*  
24 *threatened, attempted, or inflicted physical harm on himself,*  
25 *herself, or another, shall be taken into protective custody by a*  
26 *peace officer . . .*

27 RCW 70.96A.120(2). Apparently, the State believes the language relating

28 <sup>1</sup> E2SSB 5763 (2005) amended ITA to create integrated crisis response pilot programs  
29 with intent to create a unified ITA (combining RCWs 71.05 70.96A).

1 to "physical harm" is a standalone provision that is not connected to  
2 anything that went before. This is not the case. RCW 70.96A.120(2) first  
3 establishes a requirement that a person must "appear[]" to be incapacitated  
4 or gravely disabled by alcohol or other drugs." The statute then establishes  
5 a second requirement by using the word "and." This second requirement  
6 can be satisfied in one of two ways. First, the person can be in a "public  
7 place" or the person "has threatened, attempted, or inflicted physical harm  
8 on himself, herself, or another." RCW 70.96A.120(2). As a result, the  
9 statute should be read as follows:

10 . . . a person who appears to be incapacitated or gravely disabled  
11 by alcohol or other drugs **and** who is in a public place

12 or

13 . . . a person who appears to be incapacitated or gravely disabled by  
14 alcohol or other drugs **and** who has threatened, attempted, or  
15 inflicted physical harm on himself, herself, or another,

16 This reading is supported by the use of the word "or" which is used several  
17 times in the statute to connect a phrase to a proceeding phrase as an  
18 alternative and not to separate the phrase from the rest of the statute.  
19 However, it is also supported by the language in the first part of paragraph  
20 (2), which "excepts" several situations from the Act. These situations  
21 include "a person who **may be apprehended** for possible violation of laws  
22 not relating to alcoholism, drug addiction, or intoxication;" and persons  
23 who may be "apprehended" for DUI type offences. RCW  
24 70.96A.120(2)(emphasis added). Thus, a person who simply "threatened,  
attempted, or inflicted physical harm" on someone without being

1 "incapacitated or gravely disabled by alcohol" is not subject to the act  
2 because he/she "may be apprehended for possible violation of laws" (For  
3 example: assault, attempted assault, harassment, etc.) Mr. Smith could not  
4 simply be "involuntarily committed under the act due to his suicidal  
5 statements" by the officers, as the State claims in its brief (Brief of  
6 Respondent, at 11), unless Mr. Smith was also "incapacitated or gravely  
7 disabled by alcohol."<sup>2</sup> If this Court were to hold that the Act is to be  
8 interpreted as the State wishes, it would result in the police being able to  
9 forcibly commit people in numerous cases where the Act was not intended  
10 to apply.

11 *II. When reviewed in the light most favorable to the State, the*  
12 *State's evidence demonstrates that Mr. Smith could not form*  
13 *the necessary intent and that the State failed to meet its*  
14 *burden as to the element of intent*

15 The State argues that

16 . . . when reviewing the testimony, in the light most favorable to  
17 the State, with all reasonable inferences in favor of the State, the  
18 only reason Smith was being involuntarily committed by law  
19 enforcement was due to his suicidal statements.

20 Brief of Respondent, at 11. Interestingly, the claim that "the only reason  
21 Smith was being involuntarily committed by law enforcement was due to  
22 his suicidal statements" is contradicted in the State's own arguments. The  
23 State actually quotes Deputy Schlecht as testifying that one of the reasons  
24 for "involuntarily committing" Mr. Smith is that "he's unable to care for  
himself." Brief of Respondent, at 12. There are also other places in the

---

<sup>2</sup> If Mr. Smith did not meet the requirements of RCW 70.96A.120, but were in need of  
commitment this would be done through the appropriate judicial process.

1 record where the State's witnesses testify as to reasons other than "suicidal  
2 statements" for the involuntary commitment. VRP at 57 (unable to care for  
3 himself due to level of intoxication); 58 (unable to care for himself); 67  
4 (level of intoxication); 68 (possible alcohol poisoning, unable to care for  
5 himself); 74 (level of intoxication, unable to care for himself); 76 (not in  
6 "right frame of mind," level of intoxication). The officers did mention  
7 suicidal statements at various times, but it was definitely not the "only  
8 reason" for officers invoking the Act as the State claims. However, even if  
9 it was the only reason, an involuntary commitment still requires that the  
10 person be "incapacitated or gravely disabled by alcohol."

11       It should also be noted that if the Act does not apply because it  
12 only applies in public places as the State claims (Brief of Respondent at  
13 11), then police would have been acting without authority when they  
14 claimed to be involuntarily committing Mr. Smith under the Act. If the  
15 officers had no authority, then Mr. Smith was arrested without probable  
16 cause in violation of the Fourth Amendment. U.S. Const. amend. IV.

17       The State argues in several places that the testimony must be  
18 reviewed "in the light most favorable to the State, with all reasonable  
19 inferences in favor of the State" and accuses the Appellant of failing to do  
20 this. Brief of Respondent at 9, 11. However, Mr. Smith takes the State's  
21 evidence as true and looks at it as a whole. *State v. Theroff*, 25 Wash.App.  
22 590, 593, 608 P.2d 1254, aff'd, 95 Wash.2d 385, 622 P.2d 1240 (1980);  
23 *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the  
24

1 officers testify that they were involuntarily committing Mr. Smith because  
2 he was unable to care for himself due to level of intoxication, because of  
3 possible alcohol poisoning, because of his frame of mind, and because of  
4 suicidal statements, these statements are admittedly true. VRP at 57, 58,  
5 67, 68, 74, 76. More importantly, when the officers testify they were  
6 involuntarily committing Mr. Smith pursuant to the Act, those statements  
7 are admittedly true as well. VRP at 57. In fact, the only authority available  
8 to officers to act as they claimed they did is the Act. Mr. Smith, as the  
9 State has pointed out, was not on public property. However, Mr. Smith  
10 had not committed any crime that would exempt him from the Act or that  
11 would allow officers to arrest him. RCW 70.96A.120(2). Being  
12 intoxicated on private property where one is authorized to be is not even a  
13 crime. Further, Mr. Smith was invited to Mr. Collin's home with whom he  
14 consumed alcohol. VRP at 101 - 104. No evidence was presented that Mr.  
15 Smith's license as a guest was ever rescinded or altered, so he was not  
16 trespassing. As a result, when the State's evidence is examined in the light  
17 most favorable to the State, the only reasonable inference is that the  
18 officers actually did involuntarily commit Mr. Smith pursuant to the Act,  
19 exactly as they testified. They were not acting to arrest Mr. Smith of a  
20 crime that was exempted from the Act. Further, it is reasonable to infer  
21 that they were acting lawfully as they claimed. This means that Mr. Smith  
22 had to "be incapacitated or gravely disabled by alcohol," otherwise the  
23 officers' actions when they forced Mr. Smith to go to the hospital would  
24

1 have be illegal. Additionally, there is ample evidence to support the  
2 officers' conclusions that the Act gave them authority to involuntarily  
3 commit Mr. Smith.

4 The Act defines "incapacitated or gravely disabled by alcohol" as it  
5 is used in RCW 70.96A.120(2). RCW 70.96A.020 defines "Gravely  
6 disabled by alcohol" as a person who

7 . . . as a result of the use of alcohol or other psychoactive  
chemicals: (a) Is in danger of serious physical harm resulting from  
8 a failure to provide for his or her essential human needs of health  
or safety; or (b) manifests severe deterioration in routine  
9 functioning evidenced by a repeated and escalating loss of  
cognition or volitional control over his or her actions and is not  
10 receiving care as essential for his or her health or safety.

11 RCW 70.96A.020(11). This is clearly supported by and reasonably  
12 inferred from the evidence presented by the State when officers testified  
13 Mr. Smith could not care for himself and needed to be committed for his  
14 own safety. VRP at 31 ("I'm just concerned about you and your safety."),  
15 57, 58, 68, 74, 76.

16 "Incapacitated by alcohol" is defined as a person who

17 . . . as a result of the use of alcohol or other psychoactive  
chemicals, is gravely disabled or presents a likelihood of serious  
18 harm to himself or herself, to any other person, or to property.

19 RCW 70.96A.020(13). This section is satisfied by the officers' reference to  
20 Mr. Smith's "suicidal statements" and the ability to carry out the threats.  
21 Taking the State's evidence as true, looking at the evidence in the light  
22 most favorable to State, with all reasonable inferences, leads to the  
23 conclusion the evidence supports the conclusion that Mr. Smith was  
24

1 "Incapacitated by alcohol." The officers testified Mr. Smith had to go to  
2 the hospital because of the Act. VRP at 57. Further, they provided  
3 justification to support their actions and claimed authority under the Act.  
4 The authority allowing the officers to commit Mr. Smith comes only from  
5 the Act and without it the officers' actions are illegal. The State actually  
6 points to the "suicidal statements" as authority for the officers' actions  
7 pursuant to the Act (RCW 70.96A). Brief of Respondent at 11, 12.

8 It is unreasonable to infer the State's evidence in such a way that  
9 the officer's actions are illegal or that their testimony was perjured.  
10 Further, it cannot be said that the evidence is reviewed in the light most  
11 favorable to the State if the officers' actions must be viewed as illegal to  
12 support the State's argument. This is particularly true, when those actions  
13 can be justified under the Act by finding Mr. Smith was "incapacitated or  
14 gravely disabled by alcohol" as defined. RCW 70.96A.020(11). The  
15 officers repeatedly testified that Mr. Smith needed to go to the hospital  
16 because he could not care for himself. This satisfies the requirement that  
17 due to the level of intoxication, Mr. Smith could not "provide for his or  
18 her essential human needs of health or safety." *Id.*; VRP at 57, 58, 67, 68,  
19 74, 76.

20 As a result, it is clear Mr. Smith was "incapacitated or gravely  
21 disabled by alcohol" as defined by RCW 70.96A.020(11) and (13) and as  
22 required by RCW 70.96A.120(2). When a person is in this condition,  
23 his/her mental state is such that he/she cannot form the intent to commit an  
24

1 assault. The inability to think rationally or control your thoughts is the  
2 reasoning for committing someone without his/her consent as was done in  
3 this case.

4 The State also attempts to argue the evidence supports its claim  
5 that it proved intent. In support of its claim, the State cites the following:

- 6 1. Mr. Smith recognized Deputy Schlecht.
- 7 2. Mr. Smith was able to "converse with the officers."
- 8 3. Mr. Smith was able to make 'urinating' a condition.
- 9 4. Mr. Smith said "let me see that gun."
- 10 5. Mr. Smith grabbed for the gun.

11 Brief of the Respondent at 13. According to the State, these "actions show  
12 Mr. Smith acted with requisite mental state." *Id.*, at 14. However, there are  
13 a number of problems with the State's argument. First, the State's  
14 argument conflicts with the officers' justification and authority for  
15 involuntarily committing Mr. Smith pursuant to the Act. Second, 3, 4, and  
16 5 all occur after Mr. Smith had already been committed by the officers.  
17 Third, these items do not actually prove intent.

18 Under the State's reasoning, lack of intent could only be  
19 demonstrated if Mr. Smith were comatose at the time. Even completely  
20 insane people can recognize others, talk, and can recognize the bodily urge  
21 to urinate. The ability to form criminal intent is not necessary to perform  
22 these functions. Further, these first three items have nothing to do with  
23 forming the intent to commit an assault nor do they show competency.  
24 Arguably, the last two give some inference of intent, but to do what?  
Given the State's argument Mr. Smith was being committed only for his

1 suicidal statements, the reasonable inference is that the intent was to harm  
2 himself, not assault the officers. This brings us back to RCW  
3 70.96A.120(2), which requires the Mr. Smith be "incapacitated or gravely  
4 disabled by alcohol." Given that the officers had already determined that  
5 Mr. Smith was "incapacitated or gravely disabled by alcohol" at the time  
6 of the alleged assault, none of the items listed by the State prove intent  
7 beyond a reasonable doubt. However, all are consistent with a person who  
8 is unable to form the requisite intent.

9       When looked at in the light most favorable to the State, with all  
10 reasonable inferences drawn in the State's favor, the State actually proved  
11 Mr. Smith was "incapacitated or gravely disabled by alcohol," that the  
12 officers acted properly to involuntarily commit Mr. Smith pursuant to  
13 RCW 70.96A.120(2), and that Mr. Smith was, therefore, incapable of  
14 forming the necessary intent to assault Deputy Schlecht or anyone else. As  
15 a result, this Court should find for the Appellant and remand this matter to  
16 the Superior Court for dismissal of the charges with prejudice.

17       An additional item to consider is that once the officers determined  
18 that the Act applied and invoked it, they were required to "make every  
19 reasonable effort to protect [Mr. Smith's] health and safety." RCW  
20 70.96A.120(2). Further, officers may use reasonable force to ensure the  
21 committed person's safety. *Id.* However, the officers failed to meet this  
22 duty when they allowed a suicidal person who had stated "he wanted to  
23 get a gun and end his life" (VRP at 56), and who could not care for  
24

1 himself, to be released from restraints. VRP at 81 -82, 84. This failure to  
2 exercise the due care required by RCW 70.96A.120(2) led directly to the  
3 assault complained of by the State.

4       The State does not deny Mr. Smith was intoxicated. However, that  
5 is not the issue. The question here is not whether Mr. Smith was  
6 intoxicated, it is whether he was able to form the necessary criminal intent.  
7 Given the testimony of the State's own witnesses as to Mr. Smith's mental  
8 state, level of intoxication, their reliance on RCW 70.96A.120(2), and the  
9 fact that the officers actually committed Mr. Smith pursuant to the act, it is  
10 clear that when accepting the State's evidence as true, and taking it in the  
11 light most favorable to the State, with all reasonable inferences in favor of  
12 the State, the only reasonable conclusion is that Mr. Smith could not and  
13 did not form the criminal intent necessary to commit the assault. The  
14 State, therefore, failed to prove its case and this matter should be reversed  
15 and remanded for acquittal.

16       *III. Jury instructions are not proper simply because they are*  
17       *standard WPIC instructions*

18       The State argues the jury instructions were proper. In making its  
19 argument, the State attempts to do this by looking at the instructions  
20 individually (sometimes in conjunction with another instruction). The  
21 State points to the fact the instructions are standard-approved WPIC  
22 instructions. Brief of Respondent, at 20. However, the fact that a WPIC  
23 exists does not make it acceptable. Various versions of WPIC instructions  
24 have been found to be insufficient in the past. See *State v. Byrd*, 125

1 Wn.2d 707, 887 P.2d 396 (1995) note 2. As a result, the instructions have  
2 been refined over time, to correct different problems as they are  
3 discovered.

4 *IV The doctrine of invited error does not apply in this case as*  
5 *the State claims*

6 The State asserts that the defense invited error by proposing  
7 instructions six and seven, which were used at trial. Brief of Respondent at  
8 15. This is not the case. Further, the State bears the burden of proving  
9 invited error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)  
10 (overruled on other grounds *Crawford v. Washington*, 124 S.Ct. 1354, 541  
11 U.S. 36 (2004)). The State has not met this burden.

12 Although Jury Instruction No. 7 is mentioned once in Appellant's  
13 Brief, it is done only as part of the discussion on involuntary intoxication  
14 and to point out that the jury is not free to ignore it. Appellant's Brief at  
15 11. Jury Instruction No. 7 is a definition of "voluntary intoxication."  
16 Except to the extent jury instructions are taken as a whole, Appellant is  
17 unaware that Jury Instruction No. 7 was raised on appeal as an improper  
18 instruction.

19 Jury Instruction No. 6 does play a role in that it provides a  
20 definition intent. However, as the State has pointed out, it is a standard  
21 WPIC (Brief of Respondent at 17), and the same instruction was proposed  
22 by the State. Record at 38 (State's Proposed Jury Instruction No. 7).  
23 Suggesting the same standard instruction as proposed by the State is not  
24 invited error.

1           Invited error is a judicial doctrine meant to prevent a party from  
2 proposing an erroneous instruction so that the case can be overturned on  
3 appeal. *State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995). This  
4 is not the case with Jury Instruction No. 6. The argument is not that Jury  
5 Instruction No. 6 is erroneous, but that the jury instructions were  
6 confusing and effectively relieved the State of its burden to prove all  
7 elements of the charged crime beyond a reasonable doubt. This is because  
8 elements of assault are listed in a definition instruction rather than the "to  
9 convict" instruction as required. See *State v. Brown*, 147 Wn.2d 330, 345,  
10 58 P.3d 889 (2002). Although Jury Instruction No. 6 and play a role in the  
11 analysis, it is not these jury instructions that is being objected to on appeal.

12           The invited error doctrine does not apply in this case.

13           *V. A failure to object to instructions that relieve the State of its*  
14 *burden to prove every element beyond a reasonable doubt*  
15 *does not waive the right to raise the issue on appeal because*  
*it is an error of constitutional magnitude and prejudice is*  
*presumed*

16           The State argues Mr. Smith failed to object to the instructions at  
17 trial and cannot thereafter raise the issue on appeal. Brief of Respondent,  
18 at 18. However, when the instructions result in the State being relieved of  
19 its burden to prove all required elements of the charged crime, it creates a  
20 Constitutional error, which can be raised on appeal regardless of whether  
21 there was an objection at trial. *State v. Goble*, 131 Wn.App. 194, 203, 126  
22 P.3d 821 (Div. 2 2005); *State v. O'Hara*, 167 Wn.2d 91, 98, 101, 103, 217  
23 P.3d 756 (2009); *State v. Pope*, 100 Wn.App. 624, 999 P.2d 51 (Div. 2  
24

1 2000). The State attempts to get around this by arguing that "[a]bsent his  
2 argument that the instructions shift the burden and violate due process,  
3 Smith fails to argue how he can raise this issue for the first time on  
4 appeal." Brief of Respondent, at 22. This is like arguing "if you don't  
5 consider Appellant's argument, he doesn't have one," which is no  
6 argument at all. All of the State's arguments that Mr. Smith failed to object  
7 to a particular objection are irrelevant, because the issue is whether the  
8 State was improperly relieved of its burden to prove all elements beyond a  
9 reasonable doubt. This is because if the State's burden has been relieved,  
10 then the State did not prove its case regardless of whether any instruction  
11 was objected to or not. Instructions that "shift the burden and violate due  
12 process" can be raised for the first time on appeal because the error  
13 involves a constitutional right. *State v. Goble*, at 203; *State v. O'Hara*, at  
14 98, 101, 103.

15 *VI. The "to convict" instruction did not contain all the necessary*  
16 *elements of the crime because it did not contain the elements*  
17 *of assault and a definition that is not subject to proof beyond*  
18 *a reasonable doubt is insufficient to correct this error. The*  
19 *State bears the burden of proving every element beyond a*  
20 *reasonable doubt including the elements of assault.*

21 The State is required to prove every element of the crime beyond a  
22 reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 339, 345, 58 P.3d 889  
23 (2002); *State v. Byrd*, 125 Wash.2d 707, 713-14, 887 P.2d 396 (1995);  
24 *State v. Pope*, 100 Wn.App. 624, 628, 999 P.2d 51 (Div. 2 2000). Jury  
instructions must convey "that the State bears the burden of proving every  
essential element of a criminal offense beyond a reasonable doubt." *State*

1 v. *Bennett*, 161 Wash.2d 303, 307, 165 P.3d 1241 (2007); *State v. Pirtle*,  
2 127 Wn.2d 628, 656, 904 P.2d 245 (1995) (citing *In re Winship*, 397 U.S.  
3 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)); *State v. Strong*, 272 P.3d  
4 281, 167 Wn.App. 206, 210 (Wash.App. Div. 3 2012) citing *In re*  
5 *Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If the  
6 jury instructions, as given, result in relieving the State of any portion of  
7 this burden, it creates a constitutional issue that an Appellant can raise for  
8 the first time on appeal. *State v. Goble*, 131 Wn.App. 194, 203, 126 P.3d  
9 821 (Div. 2 2005); *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184  
10 (2001). If the Court finds the State has been relieved of its burden an  
11 appellant is entitled to a reversal and remand. *State v. Byrd*, 125 Wn.2d  
12 707, 714, 887 P.2d 396 (1995); *State v. Atkins*, 156 Wn.App. 799, 807,  
13 236 P.3d 897 (Div. 1 2010); *State v. Hayward*, 152 Wn.App. 632, 641 -  
14 642, 217 P.3d 354 (Div. 2 2009).

15       If the State has been relieved of its burden to prove any element of  
16 the charged crime beyond a reasonable doubt, prejudice is presumed and  
17 the State bears the burden of proving it harmless beyond reasonable doubt.  
18 *State v. Aumick*, 73 Wn.App. 379, 385, 869 P.2d 421 (Div. 3 1994); *State*  
19 *v. Allen*, 67 Wn.App. 824, 828, 840 P.2d 905 (Div. 3 1992); *State v.*  
20 *Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); See also *State v.*  
21 *Clausing*, 147 Wn.2d 620, 627, 56 P.3d 550 (2002); *State v. Brown*, 147  
22 Wn.2d 330, 340, 58 P.3d 889 (2002); *State v. Smith*, 131 Wn.2d 258, 340,  
23 930 P.2d 917 (1997). The State argues that Appellant has not shown the  
24

1 constitutional error to be manifest. Brief of Respondent at 15 - 30. An  
2 error is manifest if the appellant can show actual prejudice. *State v.*  
3 *O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). However, the State  
4 relies on *State v. O'Hara*, which relies on RAP 2.5(a). *State v. O'Hara*, at  
5 94. RAP 2.5(a) allows an appellant to raise a "manifest error affecting a  
6 constitutional right" for the first time on appeal. This is recognized in  
7 Appellate Court decisions. In *State v. O'Hara*, the defendant did not object  
8 to a self-defense jury instruction at trial. However, *O'Hara* Court found  
9 that the instruction did not "constitute a manifest error affecting a  
10 constitutional right." *State v. O'Hara*, at 95. The self-defense instruction  
11 did not fall into one of the circumstances that gave rise to a constitutional  
12 issue such as shifting the burden. *Id.*, at 103. The Court stated the test to  
13 meet RAP 2.5(a) as requiring the appellant to "demonstrate (1) the error is  
14 manifest, and (2) the error is truly of constitutional dimension." *State v.*  
15 *O'Hara*, at 98. The court then went on to clarify the test saying: "Stated  
16 another way, the appellant must 'identify a constitutional error and show  
17 how the alleged error actually affected the [appellant]'s rights at trial.' If a  
18 court determines the claim raises a manifest constitutional error, it may  
19 still be subject to a harmless error analysis." *Id.* However, the Court also  
20 found that

21 the examples of manifest constitutional errors in jury instructions  
22 include: directing a verdict, ***shifting the burden of proof to the***  
23 ***defendant, failing to define the "beyond a reasonable doubt"***  
24 ***standard, failing to require a unanimous verdict, and omitting an***  
***element of the crime charged.*** On their face, each of these  
instructional errors obviously affect a defendant's constitutional

1 rights by violating an explicit constitutional provision or denying  
2 the defendant a fair trial through a complete verdict.

3 *State v. O'Hara*, at 103 (emphasis added). Thus, where instructions shift  
4 the burden or allow the omission of a necessarily element, the instructions  
5 are always "manifest." *See, State v. Pope*, 100 Wash.App. 624, 630, 999  
6 P.2d 51, *review denied*, 141 Wash.2d 1018, 10 P.3d 1074 (2000). In Mr.  
7 Smith's case is automatically "manifest" if the burden was shifted, did not  
8 require a unanimous verdict, or omitted an element. However, under *State*  
9 *v. O'Hara* the court may still subject the claimed error to harmless error  
10 analysis.

11 In applying harmless error analysis:

12 A constitutional error is harmless if the appellate court is  
13 ***convinced beyond a reasonable doubt*** that any reasonable jury  
14 would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and ***the State bears the burden of proving that the error was harmless.*** *State v. Stephens*, 93 Wash.2d 186, 190-91, 607 P.2d 304 (1980).

15 *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)(emphasis  
16 added); see also *State v. Clausen*, 147 Wn.2d 620, 627 - 628, 56 P.3d  
17 550 (2002); *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013);  
18 *State v. McDaniel*, 155 Wn.App. 829, 851, 230 P.3d 245 (Div. 2 2010);  
19 *State v. Alvarez-Abrego*, 154 Wn.App. 351, 369, 225 P.3d 396 (Div. 2  
20 2010). Instructional error is presumed prejudicial, but can be shown to be  
21 harmless. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).  
22 However, "harmless error analysis is never applicable to the omission of  
23 an essential element of the crime in the 'to convict' instruction. Reversal is

1 required." *State v. Brown*, 147 Wn.2d 330, 345, 58 P.3d 889 (2002),  
2 citing *State v. Pope*, 100 Wash.App. 624, 630, 999 P.2d 51, *review denied*,  
3 141 Wash.2d 1018, 10 P.3d 1074 (2000). "The 'to convict' instruction,  
4 however, enjoys a special status. A 'to convict' instruction must be  
5 complete in itself." *Id.* citing *State v. Smith*, 131 Wash.2d 258, 262-63,  
6 930 P.2d 917 (1997). This is because the "to convict" instruction "is a  
7 statement of the law upon which 'the jury measures the evidence to  
8 determine guilt or innocence.'" *State v. Pope*, 100 Wn.App. 624, 629, 999  
9 P.2d 51 (Div. 2 2000) citing *State v. Smith*, at 263. All of the necessary  
10 elements must be included in the "to convict" instruction and the jury is  
11 not required to look to other instructions to find missing elements. *State v.*  
12 *Smith*, 131 Wash.2d 258, 262-63, 930 P.2d 917 (1997). The jury has "a  
13 right to regard [the 'to convict' instruction] as being a complete statement  
14 of the elements of the crime charged" because it purports "to contain all  
15 essential elements." *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845  
16 (1953). In the current case, the "to convict" instruction directed the jurors  
17 that "[t]o convict the defendant of the crime of assault in the third degree,  
18 each of the following elements of the crime must be proved beyond a  
19 reasonable doubt." Record at 36. The instruction then listed the first  
20 element as "(1) That on or about January 1, 2016, the defendant assaulted  
21 Deputy Mathew Schlecht." *Id.* However, "assault" has its own elements  
22 and those elements defined in the common law were provided in Jury  
23 Instruction No. 6, in violation of the rule set out in *State v. Smith* and *State*

24

1 v. *Emmanuel*. *Id.*, at 37.

2 "The State must prove every essential element of a crime beyond a  
3 reasonable doubt for a conviction to be upheld. . . . It is reversible error to  
4 instruct the jury in a manner that would relieve the State of this burden."  
5 *State v. Byrd*, 125 Wn.2d 707, 713 - 714, 887 P.2d 396 (1995) (internal  
6 cites omitted). If the manner in which the instructions are given results in  
7 the State not being required to prove each essential element beyond a  
8 reasonable doubt, then the State has been relieved of its burden and it is  
9 the same as if the element had been left out entirely. In this case, the "to  
10 convict" instruction failed to include all the necessary elements and  
11 instead hid those instructions in a definitional instruction that was not  
12 subject to a requirement to prove all elements beyond a reasonable doubt.

13 The "to convict" instruction "must include all of the elements of  
14 the crime because it is a statement of the law upon which 'the jury  
15 measures the evidence to determine guilt or innocence.'" *State v. Pope*, at  
16 629 citing *State v. Smith*, at 263. In the current case, the "to convict"  
17 instruction listed "assault" as an element of the crime. Record at 64. It is  
18 stated in the initial paragraph that "each of the following elements of the  
19 crime must be proved beyond a reasonable doubt." Thus, the State was  
20 required to prove "assault" beyond a reasonable doubt. However, assault is  
21 not just an element, it is a crime in and of itself that has its own elements.  
22 To prove assault beyond a reasonable doubt, it is necessary to prove the  
23 elements of assault beyond a reasonable doubt. In Washington, assault is

24

1 not defined by statute. It is, therefore, necessary to refer to the common  
2 law definition to determine the elements. *State v. Aumick*, 73 Wn.App.  
3 379, 382, 869 P.2d 421 (Div. 3 1994); *State v. Hupe*, 50 Wn.App. 277,  
4 282, 748 P.2d 263 (Div. 1 1988). The three definitions of assault  
5 recognized by Washington courts are: "(1) an attempt, with unlawful  
6 force, to inflict bodily injury upon another; (2) an unlawful touching with  
7 criminal intent; and (3) putting another in apprehension of harm whether  
8 or not the actor actually intends to inflict or is incapable of inflicting that  
9 harm." *Id.* The second and third crimes were expressed in Jury Instruction  
10 No. 5.

11 An assault is an intentional touching or striking of another person  
12 that is harmful or offensive regardless of whether any physical  
13 injury is done to the person. A touching or striking is offensive if  
the touching or striking would offend an ordinary person who is  
not unduly sensitive.

14 An assault is also an act done with the intent to create in another  
15 apprehension and fear of bodily injury, and which in fact creates in  
16 another a reasonable apprehension and imminent fear of bodily  
injury even though the actor did not actually intend to inflict bodily  
injury.

17 Record at 65. As stated in Jury Instruction No. 5 the first definition has the  
18 following three elements: 1) intent, 2) a touching or striking, and 3) the  
19 touching or striking must be harmful or offensive. The second definition  
20 has the following three elements: 1) an act, 2) intent to create fear or  
21 apprehension of bodily injury, and 3) which in fact creates fear or  
22 apprehension of bodily injury. Because the State must prove "assault"  
23 beyond a reasonable doubt, it must prove all three of the elements of at  
24

1 least one of the definitions in Jury Instruction No. 5. These elements  
2 should also be part of the "to convict" elements. However, the jury is not  
3 told that the assault elements are actually part of the charged crime or that  
4 they must be proven beyond a reasonable doubt. In addition, the jury is  
5 given a third definition of assault in Jury Instruction No. 3. Record at 63.

6 The "to convict" instruction must contain all of the elements of the  
7 charged crime. *State v. Smith*, at 262-63; *State v. Emmanuel* at 819. The  
8 jury must be instructed that each element of the charged crime must be  
9 proven beyond a reasonable doubt. *State v. Bennett*, at 307; *State v. Pirtle*,  
10 at 656; *State v. Strong*, at 210. The State must actually prove each element  
11 beyond a reasonable doubt. *State v. Byrd*, at 713-14. The jury must be  
12 unanimous as to their verdict on each of the elements. See *State v.*  
13 *Stephens*, 93 Wash.2d 186, 190, 607 P.2d 304 (1980). In Mr. Smith's case,  
14 the elements of common law assault are not contained in the "to convict"  
15 instruction.

16 When the jury is given the instructions it is told to accept the law  
17 as given to them by the judge's instructions. Record at 59 (Jury Instruction  
18 No. 1). The jury is then told in the "to convict" instruction that the State is  
19 only required to prove the elements contained in Jury Instruction No 4.  
20 The jury is then given three separate definitions of assault in two different  
21 instructions. Jury Instruction No. 3 and 5. Because these instructions are  
22 definitions, the jury is not told there is a need for each of their elements to  
23 be proven beyond a reasonable doubt. Further, although the Jury is told  
24

1 their verdict must be unanimous (Jury Instruction No. 10), they are not  
2 told whether they must be unanimous on the elements of assault or the  
3 different types of assault. As a result, some jurors could convict on the  
4 common law battery definition, others could convict on the common law  
5 assault definition, others could convict based on Jury Instruction No. 3,  
6 and, because these are just definitions that do not need to be proven  
7 beyond a reasonable doubts, some jurors might convict based on a  
8 combination of the instructions or nothing at all. Although the jurors are  
9 told they do not need to be unanimous as to elements 2(a) and 2(b) of the  
10 "to convict" instruction, they are not given any direction as to how they  
11 should apply the common law elements given in Jury Instruction No. 6.  
12 Although "[J]urors need not be unanimous as to the mode of commission"  
13 of a crime," but all the elements must be met and the jury has to be  
14 unanimous that the crime was committed. *State v. Stephens*, 93 Wn.2d  
15 186, 190, 607 P.2d 304 (1980). This could not happen because the jury  
16 was not properly instructed in the "to convict" instruction or as to the  
17 elements of assault.

18 Because all the essential elements were not included in the "to  
19 convict" instruction, Mr. Smith's conviction should be reversed and  
20 remanded for a new trial. *State v. Brown*, 147 Wn.2d 330, 345, 58 P.3d  
21 889 (2002) citing *State v. Pope*, 100 Wn.App. 624, 630, 999 P.2d 51 (Div.  
22 2 2000). Because the State was not required to prove all the elements of  
23 assault, it was relieved of its burden to prove all elements of the charged  
24

1 crime beyond a reasonable doubt, which is an error of constitutional  
2 magnitude that is not subject to harmless error analysis and requires a  
3 reversal. *Id.* Because the jurors were not instructed that the State must  
4 prove the elements listed in Jury Instruction No. 5 beyond a reasonable  
5 doubt, the State was relieved of its burden to prove all elements of the  
6 charged crime beyond a reasonable doubt, which is an error of  
7 constitutional magnitude that is not subject to harmless error analysis and  
8 requires a reversal. *Id.*; *State v. Goble*, 131 Wn.App. 194, 203, 126 P.3d  
9 821 (Div. 2 2005). Because the instructions were confusing, they were  
10 presented in a manner that effectively relieved the State of its burden to  
11 prove all elements of the charged crime beyond a reasonable doubt, which  
12 requires a reversal. *Id.*; *State v. Hayward*, 152 Wn.App. 632, 641 - 642,  
13 217 P.3d 354 (Div. 2 2009); *State v. Byrd*, 125 Wn.2d 707, 714, 887 P.2d  
14 396 (1995). Because the jury's verdict as it relates to "assault" did not  
15 require unanimity, the conviction should be reversed. The Court should,  
16 therefore, reverse Mr. Smith's conviction and remand for a new trial.

17 *VII. The failure of defense counsel to present evidence on*  
18 *involuntary intoxication or raise the issue of the involuntary*  
19 *commitment constituted Ineffective counsel because there is*  
20 *no legitimate strategy to justify the failure*

21 The State argues there was effective assistance of counsel because  
22 1) "An attorney's decision whether to call a witness to testify on behalf of  
23 his or her client is "a matter of legitimate trial tactics;" 2) "a defendant is  
24 not required to present testimony from an expert witness;" and 3) "Smith  
actually testified that he could not remember anything." Brief of

1 Respondent at 26 - 27. The State asserts the attorney's actions were merely  
2 a "failed strategy." Brief of Respondent at 27. The State also notes that  
3 prejudice is required, but does not elaborate. Brief of Respondent at 26.

4 Mr. Smith's position relating to ineffective assistance of counsel is  
5 essentially an alternative to the argument that because the State's witnesses  
6 testified they had involuntarily committed Mr. Smith pursuant to the  
7 "Involuntary Treatment Act" (VRP at 57; RCW 70.96A), the State  
8 effectively proved Mr. Smith was incapable of forming the requisite intent  
9 to commit an assault. In order to involuntarily commit Mr. Smith under  
10 RCW 70.96A.120(2), he had to be "incapacitated or gravely disabled by  
11 alcohol," meaning either the State failed to prove intent or the officers  
12 acted unlawfully. If this Court were to rule that RCW 70.96A.120(2) does  
13 not apply despite the State's evidence or finds that "incapacitated or  
14 gravely disabled by alcohol" is insufficient to satisfy involuntary  
15 intoxication, then Mr. Smith is, essentially, now required to present an  
16 affirmative defense. In such a case, the failure to put on proper evidence  
17 (such as an expert witness) or argue the applicability of RCW  
18 70.96A.120(2), would be ineffective assistance of counsel because it  
19 guarantees a conviction.

20 In Mr. Smith's case, the entire defense was based on the idea that  
21 Mr. Smith could not form the criminal intent necessary to commit an  
22 assault. If Mr. Smith was required to show he lacked intent, the failure to  
23 put on evidence to show he lacked intent is not a strategy at all; it is  
24

1 simply nothing and guarantees a conviction. Taking such an action is the  
2 same as pleading guilty except it results in added expense and time.  
3 Additionally, because the State's witnesses testified Mr. Smith was being  
4 involuntarily committed pursuant to RCW 70.96A, the failure to raise the  
5 requirements of the Act that defined Mr. Smith as being "incapacitated or  
6 gravely disabled by alcohol," was ineffective assistance of counsel  
7 because the Act provided the only basis outside of expert testimony that  
8 might enable Mr. Smith to prove his case.

9 Mr. Smith believes because the State's witnesses invoked the  
10 "Involuntary Treatment Act," the State proved Mr. Smith was  
11 "incapacitated or gravely disabled by alcohol" and incapable of forming  
12 the necessary intent, requiring a reversal of the verdict and dismissal of the  
13 charges. However, if this is not the case and Mr. Smith is required to  
14 prove the inability to form the requisite intent, then the attorney's failure to  
15 put on evidence is not a legitimate strategy because there was no chance  
16 that it could succeed. *State v. Mannering*, 150 Wn.2d 277, 286, 75 P.3d  
17 961 (2003). A strategy that cannot succeed falls "below an objective  
18 standard of reasonableness based on consideration of all the  
19 circumstances." *State v. McFarland*, 899 P.2d 1251, 127 Wn.2d 322, 334-  
20 35 (Wash. 1995). It is reasonably probable the outcome would have been  
21 different had some evidence been presented, because with such evidence  
22 Mr. Smith would have a chance for an acquittal, but without it there was no  
23 chance at all. *State v. Nichols*, 162 P.3d 1122, 161 Wn.2d 1, 8 (Wash.  
24

1 2007).

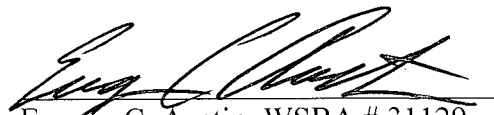
2 CONCLUSION

3 The State's evidence is insufficient to prove the element intent to  
4 commit an assault because the State's evidence shows that Mr. Smith was  
5 "incapacitated or gravely disabled by alcohol." Mr. Smith's conviction  
6 should be reversed and the charges dismissed.

7 The jury instructions as given relieve the State of its burden to  
8 prove all elements beyond a reasonable doubt. The verdict should be  
9 reversed and remanded for a new trial.

10 If the Court finds that the defendant was required to prove he could  
11 not form the requisite intent or that the burden had shifted to the defense,  
12 then the Court should find that there was ineffective assistance of counsel  
13 for failing to present any expert testimony or raise the issues created by  
14 RCW 70.96A.120(2). The verdict should be reversed and remanded for a  
15 new trial.

16 **DATED** this 20<sup>th</sup> day of February, 2017.

17  
18   
19 Eugene C. Austin, WSBA # 31129  
20 Attorney for Defendant/Appellant  
21  
22  
23  
24

FILED  
COURT OF APPEALS  
DIVISION II

2017 FEB 22 AM 11:03

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON

Plaintiff,

vs.

DALE ROBERT SMITH,

Defendant.

Court of Appeals No. 48935-0-II  
Superior Court No. 16-1-00005-21

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that a true, full and correct copy of the forgoing APPELLANT'S REPLY BRIEF was on this 21<sup>st</sup> day of February, 2017,

Mailed to: Dale Smith  
270 Collins Rd  
Toledo, WA 98591

**DATED** this 21<sup>st</sup> day of February, 2017.

  
Eugene C. Austin, WSBA # 31129

CERTIFICATE OF SERVICE

FILED  
COURT OF APPEALS  
DIVISION II

2017 FEB 22 AM 11:03

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF LEWIS**

STATE OF WASHINGTON

Plaintiff,

vs.

DALE ROBERT SMITH,

Defendant.

Court of Appeals No. 48935-0-II  
Superior Court No. 16-1-00005-21


**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that a true, full and correct copy of the forgoing APPELLANT'S REPLY BRIEF was on this 20<sup>th</sup> day of February, 2017,

Emailed to: the Lewis County Prosecutors Office at  
appeals@lewiscountywa.gov

**DATED** this 20<sup>th</sup> day of February, 2017.

  
Eugene C. Austin, WSBA # 31129

CERTIFICATE OF SERVICE

Page 1 of 1

Austin Law Office, PLLC  
PO Box 1753  
Belfair, WA 98528  
360-551-0782